

REMARKS/ARGUMENTS

Claims 1-25 are pending in this application. The Examiner has required that the claims be restricted, and Applicant has elected to prosecute claims 1-18. Applicant hereby affirms the election. Accordingly, claims 19-25 have been withdrawn from further prosecution.

The Examiner has rejected claims 10-18 under 35 U.S.C. § 112, second paragraph, as being indefinite. Specifically, the Examiner has rejected claim 10 because it is not clear whether the first and second longitudinal portions "are in a lengthwise sequence, or whether they are stacked above one another." (Office Action, page 3, lines 17-18). In response, Applicant has amended claim 10 to add the clarification that the first and second longitudinal portions are stacked above one another. Applicant believes that this amendment overcomes the Examiner's rejection.

The Examiner has rejected claims 10-11, 13, and 15 under 35 U.S.C. § 102(b) as being anticipated by Bohmeijer, et al. (EP 0 720816 A1). Applicant respectfully traverses the rejection.

In addition, the Examiner has rejected claims 12, 14, and 16-18 under 35 U.S.C. § 103(a) as being unpatentable over Bohmeijer, et al. (EP 0 720816 A1). Applicant respectfully traverses the rejection.

Rejection Under 35 U.S.C. § 102(b):

Anticipation "requires that the same invention, including each element and limitation of the claims, was known or used by others before it was invented by the patentee." *Hoover Group, Inc. v. Custom Metalcraft, Inc.*, 66 F.3d 299, 302, 36 U.S.P.Q.2d 1101, 1103 (Fed. Cir. 1995). "[P]rior knowledge by others requires that all of the elements and limitations of the claimed

subject matter must be expressly or inherently described in a single prior art reference." *Elan Pharms., Inc. v. Mayo Foundation for Medical Educ. & Research*, 304 F.2d 1221, 1227, 64 U.S.P.Q.2d 1292 (Fed. Cir. 2002) (citing *In re Robertson*, 169 F.3d 743, 745, 49 U.S.P.Q.2d 1949, 1950 (Fed. Cir. 1999); *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1571, 7 U.S.P.Q.2d 1057, 1064 (Fed. Cir. 1988)). "The single reference must describe and enable the claimed invention, **including all claim limitations**, with sufficient clarity and detail to establish that the subject matter already existed in the prior art and that its existence was recognized by persons of ordinary skill in the field of the invention." *Id.* (citing *Crown Operations Int'l, Ltd. v. Solutia Inc.*, 289 F.3d 1367, 1375, 62 U.S.P.Q.2d 1917, 1921 (Fed. Cir. 2002); *In re Spada*, 911 F.2d 705, 708, 15 U.S.P.Q.2d 1655, 1657 (Fed. Cir. 1990)); see also *PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1566, 37 U.S.P.Q.2d 1618, 1624 (Fed. Cir. 1996) (emphasis added).

Claim 10 requires, in part, "extruding an elongated sausage strand having linear protein fibers therein out of an elongated hollow meat emulsion tube." Claim 10 then requires "separating the flow of meat emulsion in the tube to a first longitudinal portion comprised of linear fibers, and a second longitudinal portion comprised of fibers, disposed in a random orientation." As set forth on page 4 of the specification and shown in Fig. 6, a single sausage strand 54 is extruded from extrusion tube 18. The single sausage strand 54 has portion 58 with protein fibers in a linear configuration. This linear portion 58 of the single strand 54 is separated from the extrusion as the strand 54 passes over restrictor element 44. After the single strand 54 passes over the restrictor element 44, the portion 58 comprised of linear fibers 57A is separated from the portion 62 comprised

of fibers 57B of random orientation. It is important to note that Applicant discloses extruding the sausage strand first, followed by separating the linear and non-linear portions of the same sausage strand.

By contrast, Bohmeijer, et al. (EP 0 720816 A1) does not teach extruding a single sausage strand and then separating the linear portion, but rather teaches co-extruding a linear portion apart from a non-linear portion apart from a non-linear portion. Claim 1 of Bohmeijer, et al. (EP 0 720816 A1) requires: "(a) co-extruding at least two meat doughs; and (b) providing the co-extruding dough with a skin." The specification states that "two meat doughs are co-extruded, one meat dough being extruded through a venturi such that the fibres are randomised and the other meat dough being extruded such that the fibres are allowed to align to the direction of flow." (Col. 2, lines 50-54). Further, Fig. 1 shows a sausage 8 with linear fibers being co-extruded apart from a sausage 6 comprised of non-linear fibers.

Because Bohmeijer, et al. (EP 0 720816 A1) does not teach extruding a single sausage and then separating the portion of the sausage with linear fibers from that portion of the single sausage with non-linear fibers, Bohmeijer, et al. (EP 0 720816 A1) does not contain each and every limitation of Applicant's independent claim 10. Specifically, the limitation in claim 10 requiring extruding an elongated sausage strand prior to separating the flow of meat emulsion is not taught by Bohmeijer, et al. (EP 0 720816 A1). Accordingly, the rejection based on anticipation should be withdrawn.

Rejection Under 35 U.S.C. § 103(a):

Applicant asserts that the Examiner has failed to meet the burden of establishing a prima facie case of obviousness. "In determining the propriety of the Patent Office case for

obviousness in the first instance, it is necessary to ascertain whether or not the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art having the reference before him to make the proposed substitution, combination, or other modification." *In re Lintner*, 458 F.2d 1013, 1016, 173 U.S.P.Q. 560, 562 (CCPA 1972).

"There are three possible sources for a motivation to combine references: the nature of the problem to be solved, the teachings of the prior art, and the knowledge of persons of ordinary skill in the art." *In re Rouffet*, 149 F.3d 1350, 1357, 47 U.S.P.Q.2d 1453, 1457-58 (Fed. Cir. 1998) (recognizing that the combination of the references taught every element of the claimed invention; however, without a motivation to combine, a rejection based on a prima facie case of obviousness was held improper).

Here, the Examiner has reached a conclusion of obviousness because "frying, steaming, and microwaving were all commonly known methods of heating foods such as sausage." (Office Action, page 5, lines 2-3). The Examiner offers no support or explanation for this conclusion. Further, the Examiner does not identify a source or explain any motivation to combine the references from the nature of the problem to be solved, the teachings of the prior art, or the knowledge of persons of ordinary skill in the art.

Even if there was some objective motivation to combine the references as suggested by the Examiner, the apparatus that would result still would not meet the limitations of independent claim 10. The teachings or suggestions to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. See *In re Vacck*, 997 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991);

MPEP § 2143. In other words, to establish prima facie obviousness of a claimed invention, all the claim limitations must be taught by the prior art. *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (CCPA 1974).

Thus, the structure that would result from the Examiner's proposed combination does not meet the terms of independent claim 10. The combination that would result would not include extruding a single sausage strand and then separating the linear portion in a single extrusion, as called for in claim 10. The Examiner may not use Applicant's claimed invention as an instruction manual or template to piece together the teachings of the prior art so that the claimed invention is rendered obvious. See *In re Fitch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992). The only way to arrive at the structure proposed by the Examiner is to rely upon hindsight, in view of the application. The Federal Circuit has held that "one cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." *In re Fine*, 837 F.2d 1071, 1075 (Fed. Cir. 1988).

Therefore, as the combination of prior art does not result in the invention as claimed, and the combination proposed by the Examiner can only be achieved through hindsight, the obvious rejection should be withdrawn.

CONCLUSION

In view of the above amendments and remarks, Applicant believes claims 1-18 are in condition for allowance and respectfully requests allowance of such claims. If any issues remain that may be expeditiously addressed in a telephone interview, the Examiner is encouraged to telephone the undersigned at 515/558-0200.

Appl. No. 10/037,098
Reply to Office Action dated December 2, 2003
Attorney Docket No. P05392US0



Any fees or extensions of time believed to be due in connection with this amendment are enclosed herein; however, consider this a request for any extension inadvertently omitted, and charge any additional fees to Deposit Account No. 50-2098.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. H. Zarley".

Donald H. Zarley
Reg. No. 18,543
ZARLEY LAW FIRM, P.L.C
Capital Square
400 Locust Street, Suite 200
Des Moines, IA 50309-2350
Phone No. (515) 558-0200
Fax No. (515) 558-7790
Customer No. 34082
Attorneys of Record

DHZ/SRK/kc